80-1221

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IN THE

Supreme Court of the United States

_____ TERM, 1981

No. _____

HARRY L. RIGGS, JR., *Petitioner*

vs.

THE BOARD OF TRUSTEES OF THE
OHIO STATE UNIVERSITY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January __, 1981

QUESTIONS PRESENTED

1. Does a state or its "alter ego" waive Eleventh Amendment immunity by engaging in a totally proprietary, federally regulated and non-governmental function; and

2. Should the bar of Eleventh Amendment immunity apply in an action seeking retroactive monetary relief which will not be paid from a state treasury?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

On October 24, 1980 the United States Court of Appeals for the Fourth Circuit filed an opinion which affirmed a Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia which had been entered on September 14, 1979. Neither opinions are reported. Copies of both are printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 24, 1980. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

United States Constitution, Amendment 11:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign states."

STATEMENT OF CASES

Four separate actions *(Ottinger, Cohen, Luke* and *Travelers)* were instituted against Harry L. Riggs and the Estate of Joseph L. Reid in the United States District Court for the Eastern District of Virginia. In each the Defendant Riggs filed third party Complaints against the Board of Trustees of the Ohio State University (hereinafter "OSU") for contribution and/or indemnity.

The *Ottinger* and *Cohen* actions were separately instituted, but argued together upon motion of OSU for summary judgment based upon Eleventh Admendment immunity. A memorandum opinion and order granting the motions were filed September 14, 1979. Thereafter, the *Luke* and *Travelers* actions were instituted and third party compaints served in those actions upon OSU were dismissed by Judge Bryan upon the authority of the previously entered memorandum opinion and order.

The four actions were consolidated for appeal and were argued October 6, 1980. The per curiam opinion of the Fourth Circuit affirming Judge Bryan's memorandum order was filed October 24, 1980.

Subsequent to the entry of Judge Bryan's order, the claims of the Ottingers, Lukes and Cohens were settled by the Defendant Riggs, who preserved his rights to con-

tinue to assert his claims against OSU. *Travelers* was tried before a jury and resulted in a verdict for the defendants.

Facts

For several years prior to November 30, 1977 a 1966 Piper Aztec aircraft owned by the Defendant Harry L. Riggs, Jr. was hangared and maintained at the Ohio State University airport. Joseph L. Reid was employed by the Ohio State University as chief pilot of the Air Transportation Service.

On November 30, 1977 Reid was delivering the aircraft to the Washington, D.C. area when it crashed into a townhouse occupied by the Ottingers. Both Ottingers and the pilot were killed. Property owned by the Lukes and Cohens was damaged, and they claimed psychic injury resulting from the trauma of the crash. The Travelers Insurance Company insured property damaged by the crash and instituted a subrogation action.

In his third party compaint Riggs contends that:

> (1) On the occasion of the crash Reid was acting as the agent, servant and employee of OSU; and
>
> (2) That a mechanical failure in the aircraft resulting from negligent maintenance and inspection on the part of OSU caused or contributed to the cause of the crash.

OSU operates the third busiest airport in the State of Ohio. Its fixed base operation is a certified repair station licensed by the Federal Aviation Administration. Approximately 230 to 240 privately owned aircraft are based at the airport, in addition to the approximately 21 aircraft owned by OSU.

The mechanics employed by OSU are licensed by the FAA and repair, service, fuel and maintain privately owned aircraft on a for-profit fee basis. The Ohio State University is one of the largest state universities in the nation. Only 50 to 70 of the thousands of students enrolled to take flight training.

OSU advertises its services and during the 1976-77 fiscal year realized total income of $1,797,300 for fees and other charges at the airport. During fiscal 1977-78 the income figure amounted to $2,042,100, for total income over a two year period of $3,849,400.

OSU had purchased a policy of liability insurance covering its aircraft operations, the limits of which are such that OSU's share of the settlements (whether it be eventually required to pay 50% contribution or 100% idemnification) would fall well within the policy limits and would be paid by the insurance company.

FEDERAL JURISDICTION

Jurisdiction of the District Court was predicated upon the diversity of citizenship statute, 28 U.S.C. §1332(a). All plaintiffs were residents of the State of Virginia. The Defendant Riggs is a citizen of the State of Kentucky and the Administrator of the Reid estate was a citizen of the State of Ohio. The claim against the Board of Trustees of The Ohio State University arose out of the same set of facts which were determinative of the original claims, requiring no independent jurisdictional grounds for the third party claims.

REASONS FOR GRANTING THE WRIT

I.

OSU WAS NOT ACTING AS THE "ALTER EGO" OF THE STATE OF OHIO IN SERVING AND MAINTAINING PRI-

VATE AIRCRAFT; AND OSU HAS WAIVED ITS ELEVENTH AMENDMENT IMMUNITY.

We urge this Court to grant certiorari to decide important questions of Federal law which have not been, but which should be, settled by this Court.

Those questions are:

(1) Does the "alter ego" of a State waive Eleventh Amendment immunity by engaging in a totally proprietary, federally regulated and non-governmental function; and

(2) Should the bar of Eleventh Amendment immunity apply in an action seeking retroactive monetary relief which will not be paid from a state treasury?

OSU's liability in these cases is predicated upon improper maintenance and servicing of private aircraft, as well as upon their vicarious liability as principal for their agent, Joseph L. Reid.

In neither instance was OSU performing a governmental function.

It is conceded, for purposes of argument in this petition, that under application of Ohio state law, the Ohio State University is the "alter ego" of the State of Ohio. We urge this court to grant certiorari to decide the effect of the entry of a state or its "alter ego" into non-governmental activities upon its claimed immunity under the Eleventh Amendment. The question was at least implicitly raised in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973) wherein this court stated:

"The history and tradition of the Eleventh Amendment indicate that by reason of that barrier

> a federal court is not competent to render judgment against a non-consenting state. *Parden* involved the railroad business which Alabama operated 'for profit'. 377 U. S. at 185. *Parden* was in the area where private persons and corporations normally ran the enterprise." 411 U. S. at 284.

Here OSU entered a pervasively federally regulated area — interstate aviation — in operating its aircraft repair facility and in offering flight instruction. The legislative history of the Federal Aviation Act of 1958 and the Federal Aviation Regulations enacted pursuant to it clearly evidences an intention by Congress to pre-empt or broadly regulate the field of interstate aviation. Title 49, Section 1508 of the United States Code declares the United States of America to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. Concededly, no private right of action is specifically granted by the Federal Aviation Act of 1958. However, violation of the Federal Aviation Regulations (FAR) enacted to it has been held to give rise to a private right of action, *Peninsula Airport Commission v. National Airlines, Inc.*, 436 F. Supp. 850 (E.D. Va. 1977); *Nader v. Allegheny Airlines, Inc.*, 512 F. 2d 527 (1975); *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499 (1956).

Application of Eleventh Amendment immunity to OSU's activities in operating a for-profit, non-governmental function in an area pre-empted by Federal legislation does not serve the federalism principle of separation of state and federal powers.

Adjudication in the Federal Courts of the private rights of Riggs and the OSU Department of Aviation in no way constitutes an interference by the Federal judiciary with internal functioning of the State of Ohio.

This court has held in *Ex parte Young*, 209 U.S. 123 (1908) and in *Edelman v. Jordan*, 415 U.S. 651 (1974) that actions against a state seeking prospective injunctive or declaratory relief are not barred by the Eleventh Admendment. In *Milliken v. Bradley*, 433 U.S. 267 (1977) this court held that the Eleventh Admendment constituted no bar to prospective relief which would require payment from state funds. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975) this court has held the Eleventh Admendment no bar to enforcement of Congressionally enacted "appropriate legislation" for the purpose of enforcing the Fourteenth Amendment against states or state officials. This court has held that a state may waive its Eleventh Amendment immunity by engaging in interstate commerce by rail following the enactment of the Federal Employers Liability Act, *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964).

The several states have increasingly expanded their scope of activities to include areas previously under private control. This, coupled with the expansion of due process and equal protection concepts to include previously unrecognized claims against governmental defendants requires this court's resolution of the question of participation by states in traditionally private enterprise upon their claimed immunity under the Eleventh Amendment.

II.

THE ELEVENTH AMENDMENT SHOULD NOT BAR AN ACTION SEEKING RELIEF AGAINST A STATE WHICH CANNOT BE PAID FROM STATE TREASURIES.

The Eleventh Amendment was enacted in response to this court's decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793). Its purposes were to prevent the Federal courts from interfering with internal operations of the states and

to protect state treasuries. Neither purpose is served where, as stated herein, the state has entered the pervasively federally regulated sphere of interstate commerce and is engaged in an enterprise traditionally reserved to the private sector, nor are the purposes served where state funds are not required to pay any judgment. The immunity of the Eleventh Amendment is given effect to protect state treasuries, *Ford Motor Company v. Department of Treasury*, 323 U.S. 459 (1945).

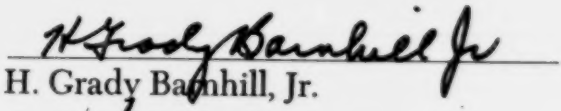
Here, the treasury of the State of Ohio is not under attack. All portions of any retroactive jugment which might be entered in this action against OSU would be paid from the proceeds of a liability insurance policy. Even absent the existence of that policy, the proceeds generated by the for-profit operation by OSU of its airport maintenance, repair, service and flight instruction facilities ($3,849,400 in 2 years) would be more than adequate to pay any judgment.

We urge this Court to grant certiorari to consider our contention that the Eleventh Amendment should not constitute a bar in an action against a state or the "alter ego" of a state in an action seeking retroactive relief arising out of proprietary activities in an area pre-empted by federal regulations, especially under circumstances where the payment of any retroactive judgment would not require the expenditure from state funds.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit and of the District Court for the Eastern District of Virginia.

Respectfully submitted.



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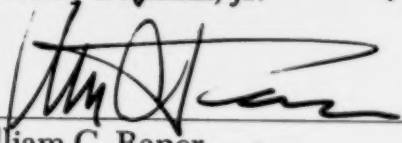

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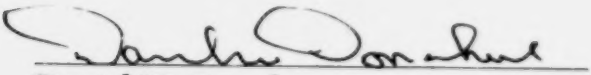

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1009

Jerome Cohen, Carol Ann Cohen, Wendy Lee Cohen and Lisa Ellen Cohen, an infant by her father Jerome Cohen,

Plaintiffs,

v.

Harry L. Riggs, Jr.,

Appellant,

and

Mabel F. Reid, Executrix of the Estate of Joseph L. Reid,

Defendant,

v.

The Board of Trustees of the Ohio State University,

Appellee.

No. 80-1010

Harry Ottinger, Jr.; Susan H. Ottinger; Joseph B. Gartlan, Jr., Administrators of the estate of Harry Ottinger, III, deceased; and, Ralph E. Anderson; Margie J. Anderson; and, Joseph B. Gartlan, Jr., Administrators of the estate of Sue Ellen Ottinger, deceased,

Plaintiffs,

v.

Harry L. Riggs, Jr.,

Appellant,

and

Mabel F. Reid, Executrix of the Estate of
Joseph L. Reid,

Defendant,

v.

The Board of Trustees of The Ohio
State University,

Appellee.

No. 80-1110

Paul F. Luke, Joan Wendy Luke,

Plaintiffs,

v.

Wayne Huggins, Sheriff, Administrator
of the Estate of Joseph L. Reid,

Defendant,

and

Harry L. Riggs, Jr.,

Appellant,

v.

The Board of Trustees of
Ohio State University,

Appellees.

No. 80-1450

Veronica Frankenstein, John Frankenstein,

Plaintiffs,

v.

Harry L. Riggs, Jr.,

Appellant,

and

Mabel V. Reid,

Defendant,

v.

Board of Trustees of the Ohio
State University,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued, October 6, 1980 Decided October 24,1980

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and PHILLIPS, Circuit Judge.

Grady Barnhill, Jr. (Daniel W. Donahue, Womble, Carlyle, Sandridge & Rice on brief) for Appellant; Joseph D. Lonardo (Larry R. Thompson, Suzanne K. Richards, Vorys, Sater, Seymour and Pease; Gregory L. Murphy, Murphy, McGettigan, McNally & West on brief) for Appellee.

PER CURIAM:

Harry L. Riggs, Jr., the defendant in several suits for wrongful death and personal injuries resulting from the crash of an airplane owned by him and serviced by The Ohio State University, appeals the dismissal of his third-party claim against the Board of Trustees of The Ohio State University claiming contribution or indemnity on the ground that the plane was serviced and maintained by the University and its pilot at the time of the crash was acting as the agent of the University. The district court dismissed

the third-party claimant on the ground that suit in a federal district court was barred by the eleventh amendment.

We affirm. In agreement with the district court we conclude that the eleventh amendment barred suit in a federal court and that the defendant had neither expressly nor impliedly waived its eleventh amendment immunity.

We affirm on the memorandum opinion of the district court. Ottinger, et al. v. Riggs, Civil Action Nos. 79-262-A, 79-430-A, 79-1021-A (E.D. Va. September 14, 1979).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

HARRY OTTINGER, JR., et al.,
Plaintiffs,

v.

HARRY L. RIGGS, JR.,
Defendant and Third-Party Plaintiff,

v.

THE BOARD OF TRUSEES OF THE OHIO STATE UNIVERSITY,
Third-Party Defendant.

CIVIL ACTION NO. 79-262-A

JEROME COHEN, et al., and LISA ELLEN COHEN, an infant, by her father, Jerome Cohen,
Plaintiffs,

v.

HARRY L. RIGGS, JR.,
Defendant and Third-Party Plaintiff,

v.

THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY,
Third-Party Defendant.

CIVIL ACTION NO. 79-430-A

MEMORANDUM OPINION

These actions are before the Court on the motion of the third party defendant, The Board of Trustees of Ohio State University (Ohio State), for summary judgment on the third-party complaint filed by the defendant Harry L. Riggs, Jr. (Riggs). While the motion is designated as one to dismiss, both parties agree to its being treated as one for summary judgment. They further agree that there are no material facts pertinent to the issues raised by the motion which are genuinely in issue, and that resolution of those issues by summary judgment is appropriate. The motion was argued on September 7, 1979.

The background of the actions is this:

On November 30, 1977 a twin engine Piper Aztec aircraft owned by defendant Riggs, and then being piloted by Joseph L. Reid, chief pilot in the Department of Aviation of The Ohio State University, crashed into a townhouse located in Reston, Virginia, approximately 6 miles from the Dulles International Airport, killing the pilot and the two occupants of the townhouse, Harry Ottinger, III, and Sue Ellen Ottinger. An adjacent townhouse owned by the Cohens was damaged.

The Administrators of the Estates of Mr. and Mrs. Ottinger and the Cohens instituted suit in the United States District Court for the Eastern District of Virginia alleging that the aircraft was negligently and improperly operated, maintained and controlled.

Riggs' third-party complaint seeks contribution or indemnification from Ohio State for any sums Riggs is found obligated to pay the plaintiffs. It alleges, substantively:

(1) The pilot, Joseph L. Reid, a regular employee of Ohio State and its chief pilot, was acting as the agent,

servant and employee of Ohio State on the occasion of the crash; and

(2) If the aircraft were defectively maintained and serviced (which was denied), the service was performed by Ohio State, and Ohio State is liable for any such defective maintenance or service.

The foregoing activities, it is alleged, arise from Ohio State's ownership and operation of the Ohio State University Airport.

It is further alleged in the third-party complaint that defendant Riggs is a citizen of the State of Kentucky and that the individual members of the Board of Trustees of Ohio State are residents of the State of Ohio. By Ohio statute, R.C. 3335.03, the Board of Trustees of the Ohio State University is the entity required by statute to be named in a suit brought against Ohio State.

Ohio State grounds its motion on two propositions — (1) that as an instrumentality of the State of Ohio, it is not a "citizen" of any state within the meaning of 28 U.S.C. §1332 and thus diversity jurisdiction does not exist; and (2) that because of Ohio State's status as an instrumentality of the State of Ohio, the Eleventh Amendment prohibits Riggs from suing Ohio State in a federal court.

Diversity

Ohio State did not press the first proposition during argument, and the Court rejects it. There need be no independent jurisdictional grounds for the third-party claim where there is diversity between the original parties and where, as here, the rights asserted by the claim grow out of the same set of facts which is determinative of the original claim. 6 Wright & Miller, Federal Practice and Procedure: Civil §1444.

Eleventh Amendment

The Eleventh Amendment[1] protects states from being sued in federal court without their consent.[2] As a result the initial determination to be made is whether the Eleventh Amendment can be raised as a potential barrier to suit; and this depends upon whether Ohio State is the "alter ego" of the state. While the response to a claimed Eleventh Amendment immunity must of course be determined by federal law, the question " . . . depends at least in part, upon the nature of the entity created by state law." *Mt. Healthy City School District. v. Doyle,* 429 U.S. 274, 280 (1977); *Brennan v. University of Kansas,* 451 F.2d. 1287, 1290 (10th Cir. 1971). Clearly under Ohio law, Ohio State is an instrumentality of the State of Ohio. *Wolfe v. Ohio State University Hospital,* 170 Ohio St. 49 (1959), Ohio R.C. §2743.01.[3] In *Soni v. Board of Trustees of the University of Tennessee,* 513 F.2d 347 (6th Cir. 1975), cited by Riggs, the Court assumed without deciding that the university was a state instrumentality, but the case was decided on the basis of waiver. In *Hander v. San Jacinto*

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1. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Subjects of any Foreign State." U.S.C.A. Const. Amend. 11.

2. The Eleventh Amendment was passed in reaction to the Supreme Court's decision in *Chisholm v. Georgia,* 2 Dall. 419 (1793) in which a suit was brought by two citizens of South Carolina, executors of a British creditor, against the State of Georgia. When Georgia was held liable to suit, national sentiment was such that within five years the Eleventh Amendment was passed overriding *Chisholm.*

3. "(A) 'State' means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions."

Junior College, 519 F.2d 273, 279 (5th Cir. 1975), also cited by Riggs, the court held that the junior college in question was a part of a junior college district which was an independent political subdivision not immune from suit. These features of those two cases distinguish them from the present case. Moreover, despite respectable authority to the contrary, to wit. *Dyson v. Lavery*, 417 F. Supp. 103 (E.D. Va. 1976),[4] this Court is persuaded that the autonomy exercised by Ohio State is no more than was exercised by the colleges and universities involved in the many decisions which have considered them as "alter egos" of the state. *Jagnandan* v. *Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977); *Brennan v. University of Kansas, supra; Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975); *Hamilton Manufacturing Co. v. Trustees of State Colleges in Colorado*, 356 F.2d 599 (10th Cir. 1966); *Walstad v. University of Minnesota Hospitals*, 442 F.2d 634 (8th Cir. 1971); *Prebble v. Brodrick*, 535 F.2d 605 (10th Cir. 1976); *Martin v. University of Louisville*, 541 F.2d 1171 (6th Cir. 1976); *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976); *Depperman v. University of Kentucky*, 371 F. Supp. 73 (E.D. Ky 1974); *Knox v. Regents of University of Wisconsin*, 385 F. Supp. 886 (E.D. Wisc. 1975); and *Roberson v. Dale*, 464 F. Supp. 680 (M.D.N.C. 1979).

Ohio State is governed by a Board of Trustees which is appointed by the Governor with the advice and consent

4. The result in *Dyson v. Lavery* can be accepted by the presence in the case of the Fourteenth Amendment element, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); however that was not the rationale of the district court decision.

of the Senate.[5] The title to the land occupied by Ohio State is held in the name of the state.[6] Additionally, the University is precluded by statute from having any debts or liabilities without the consent of the legislature.[7] Finally, the State of Ohio oversees and controls the fiscal policies of the university.[8]

An additional consideration of Eleventh Amendment analysis is whether a judgment would deplete the state

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5. "The government of the Ohio state university shall be vested in a board of nine trustees, who shall be appointed by the governor, with the advice and consent of the senate. In addition to the seven trustees holding office on September 20, 1963, two trustees shall be appointed immediately after such date, one for a term ending May 14, 1971, and one for a term ending May 14, 1972. On May 14, 1964, and annually thereafter on the fourteenth day of May, one trustee shall be appointed for a term of nine years. Those persons serving as members of such board on September 20, 1963 shall continue to serve until their present terms expire. No person who has served a full nine-year term or more than six years of such a term shall be eligible to reappointment. The trustees shall not receive compensation for their services, but shall be paid their reasonable necessary expenses while engaged in the discharge of their official duties." Ohio Rev. Code Ann. § 3335.02.

6. "The title for all lands for the use of the Ohio state university shall be made in fee simple to the state, with covenants of seizin and warranty, and no title shall be taken by the state for the use of the university until the attorney general is satisfied that it is free from all defects and encumbrances. The title is properties, real and personal, purchased by the board of trustees as an investment, and held in the university's endowment portfolio, shall not be vested in the state, but shall be held in trust by the said board." Ohio Rev. Code Ann. § 3335.13.

7. "The board of trustees of the Ohio state university shall have general supervision of all lands, buildings, and other property belonging to the university, and the control of all expenses therefor, but shall not contract a debt not previously authorized by the general assembly." Ohio Rev. Code Ann. § 63335.10.

8. Among various indicia of fiscal oversight is the requirement that "[a]ll receipts and expenditures [of Ohio State] are subject to the inspection of the auditor of [the] state." Ohio Rev. Code Ann. § 3345.05.

treasury. *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U.S. 76 (1883); *Edelman v. Jordan*, 415 U.S. 651 (1974). As the Supreme Court explained in *Edelman*, "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment [citations omitted]." 415 U.S. at 653.

In the present action, payment of a judgment would not immediately deplete the state treasury because the university's funds are held separately by the Board of Trustees. However, there is no question but that the university's source of funds (admittedly supplemented by bonds, individual and government donations, fees from students and fees from facility users – the latter including users of the airport) is the state treasury, and to the extent that the university's funds are depleted the state's appropriation must be increased.

Accordingly the Court concludes that Ohio State is the alter ego of the State of Ohio for Eleventh Amendment purposes.

Having decided that the Eleventh Amendment immunity does attach, it must be determined whether the protection has been waived. This depends, in the Court's view, upon whether the Fourth Circuit case of *Chesapeake Bay Bridge and Tunnell District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968), retains its vitality in light of *Edelman v. Jordan*, 415 U.S. 615 (1974). *Lauritzen* may be distinguished from the present case in that there the state petitioned for permission to occupy navigable waters and there was a maritime element not present in the instant case, yet on facts basically similar to those present here the Fourth Circuit held that the state had constructively or impliedly waived its Eleventh Amendment immunity.

Edelman requires more. There the Court rejected the argument that Illinois had "constructively consented" to the suit by participating in the federal Aid to the Aged, Blind or Disabled program and agreeing to administer federal and state funds in compliance with federal law:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." [Citations omitted.] We see no reason to retreat from the Court's statement in *Great Northen Life Insurance Co. v. Read*, 322 U.S., at 54 (footnote omitted):
>
> > "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."
>
> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation of the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts. 415 U.S. at 673.

The Court recognizes that the issue of the state being engaged in a governmental vis-a-vis proprietary function, a point also raised by Riggs, was not present in *Edelman*. Nevertheless the discussion in *Edelman* of *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), is important. *Parden* was primarily relied on by the *Lauritzen* court, and is heavily relied on by Riggs.

Edelman points out that in *Parden* there was involved a congressional enactment (the Federal Employers' Liability Act) which expressly authorized suits against a class of defendants which literally included the State of Illinois. In *Edelman,* the Court held that the question of waiver in *Parden* " . . . turn[ed] on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." 415 U.S. at 672.

Here the State of Ohio through its airport participates in activities involving interstate commerce – certainly an area subject to pervasive federal regulation. Yet under *Edelman* such participation is insufficient alone to constitute the necessary express or overwhelming implied statement of waiver.

While whether the Federal Aviation Act confers a private right of action is debatable, such a right of action, implied as it must be, is insufficient to constitute an intent of Congress "to abrogate the immunity in question." As the Court explained in *Edelman:*

> [W]hile this Court has, in cases such as *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant. 415 U.S. at 673-674.

Certainly there is in the Federal Aviation Act no clear evidence of congressional purpose to lift the state's immunity. *Employees of Department of Public Health and Welfare,* 411 U.S. 279 (1973).

Nor is the Court persuaded to find a lack of Eleventh Amendment protection because it is arguable that the

State of Ohio has left the "sphere that is exclusively its own and enter[ed] into activities subject to congressional regulations . . . ." While such action makes the question of immunity one of federal law and subjects the state to those congressional regulations, *Parden, supra* at 196, it does not automatically constitute the kind of waiver required by *Edelman,* particularly where as here there is no violation of federal regulation alleged in the complaint or suggested in Riggs' argument.

It is questionable whether the operation of an airport today, even through a university, can be considered outside the state's exclusive sphere in light of the widespread, almost complete in this country, governmental ownership of airports. Indeed, Ohio State has further indicated that the airport is operated by the university primarily as a teaching facility.[9] As the cases cited above show, none of those many courts considered the operation of a college outside a sphere exclusively the state's so as to remove Eleventh Amendment protection.

For the foregoing reasons the Court concludes that Ohio State is immune in these actions from suit in a federal court; and the motion of Ohio State for summary judgment will be granted.

Albert V. Bryan, Jr.

United States District Judge

Alexandria, Virginia
September 14th, 1979

9. It is helpful to consider analogously the university teaching hospital. *In Walstad v. University of Minnesota Hospitals, supra,* 442 F.2d at 641-2, the Court found the teaching hospital to be part of the university which was itself an instrumentality of the state.

No. 80-1221

FEB 23 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARRY L. RIGGS, JR.,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE
OHIO STATE UNIVERSITY,

Respondent.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fourth Circuit**

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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February 23, 1981

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THE "QUESTIONS PRESENTED"

In his "Questions Presented," the Petitioner misstates the holdings of the courts below. The United States District Court for the Eastern District of Virginia, as affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit, does not, as Petitioner claims, put in issue the question of a state's engagement in a totally proprietary, non-governmental function.

As the premise for the first question presented, the Petitioner states that the immunity afforded Respondent under the Eleventh Amendment to the Constitution of the United States is not applicable because The Ohio State University, as the alter ego of the State of Ohio, is engaged in a "non-governmental function in an area pre-empted by Federal legislation." (Petition for Writ of Certiorari, p.6). But, the District Court (and the Fourth Circuit) concluded that "it is questionable whether the operation of an airport today, even through a university, can be considered outside the state's exclusive sphere in light of the widespread, almost complete in this country, governmental ownership of airports." (A-14).* The Court actually observed that The Ohio State University Airport was operated by the University primarily as a teaching facility and stated that under the pertinent case law no court had considered the operation of a college to be "outside a sphere exclusively the state's." (A-14).

And, while the Court indicated that the operation of an airport involves activities within interstate commerce, an area subject to federal regulation, the Court did not find this to be an area "pre-empted" by federal legislation.

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* Any reference to the appendix (A-) is to the appendix of Petitioner in his petition for writ of certiorari.

Thus, the real issue presented in the first question is whether a state or its "alter ego" waives Eleventh Amendment immunity by engaging in an activity which is federally regulated. Moreover, because the Petitioner has conceded that The Ohio State University is the alter ego of the State of Ohio, the second question presented is merely whether purchase of a liability insurance policy constitutes a waiver of the state's Eleventh Amendment immunity.

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OCTOBER TERM, 1981

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HARRY L. RIGGS, JR.,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, The Ohio State University ("Ohio State"), is a state institution of higher education created by and existing pursuant to the statutes of the State of Ohio. Ohio State was named as a third-party defendant[1] in four aviation tort claims (*Ottinger, Cohen, Luke,* and *Travelers*) brought against the Petitioner, Harry L. Riggs, Jr. The claims arose as a result of an incident in

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[1] The Board of Trustees of The Ohio State University was named as the third-party defendant because it is the entity required by statute to be named in a suit brought against Ohio State. *See* Ohio Rev. Code §3335.03.

which a private aircraft, owned by Petitioner, crashed into a Virginia townhouse, killing its two occupants, Harry Ottinger and Sue Ottinger, and allegedly causing property damage and/or personal injury to the Cohens, the Lukes, and an insured of Travelers Insurance Company all of whom owned adjacent townhouses. As a result of this accident, the administrator of the estate of Mr. and Mrs. Ottinger instituted a wrongful death action against Petitioner in the United States District Court for the Eastern District of Virginia. The *Cohen, Luke* and *Travelers* cases were filed subsequent to the *Ottinger* case. The Plaintiffs asserted that Joseph Reid, the pilot, was the agent of Petitioner and that, as owner of the aircraft, the Petitioner was legally responsible for any negligence in the operation, control and maintenance of the aircraft.

In each case, Petitioner filed third-party complaints naming the Respondent as third-party defendant. By the complaints, Petitioner sought contribution or indemnity from Ohio State on two grounds: (1) that Pilot Joseph Reid, by virtue of his employment with Ohio State, was acting as an agent not only of Petitioner Riggs but also of Respondent Ohio State; and (2) that should liability attach to Petitioner by reason of negligent maintenance of the aircraft, Respondent should be liable because Petitioner's aircraft was hangared and maintained at The Ohio State University Airport.

Ohio State filed a Motion to Dismiss and/or for Summary Judgment on the grounds that Ohio State, as an instrumentality of the State of Ohio, could not be sued in federal court because of the provisions of the Eleventh Amendment to the Constitution of the United States. This issue was the subject of extensive discovery. Depositions of the Vice President of Finance and Plan-

ning at Ohio State, the Chairman of the Department of Aviation, and various Ohio State employees were taken; Requests to Admit and Interrogatories were answered; and documents were produced.

After briefs were submitted and oral arguments heard, Judge Bryan of the United States District Court for the Eastern District of Virginia issued a ten page Memorandum Opinion granting Ohio State's Motion to Dismiss and/or for Summary Judgment. Subsequent to the decision in *Ottinger* and *Cohen*, the *Luke* and *Travelers* cases were filed. Judge Bryan dismissed the latter two cases on the basis of his earlier decision.

Petitioner appealed the decisions to the Court of Appeals for the Fourth Circuit, where the four actions were consolidated for appeal. The Fourth Circuit, in a *per curiam* decision, affirmed Judge Bryan's Opinion.

In his Memorandum Opinion, Judge Bryan recited his detailed factual findings with respect to The Ohio State University and its airport which are important to a consideration of this case. As Judge Bryan noted, Ohio State is governed by a Board of Trustees appointed by the Governor of the State of Ohio with the advice and consent of the Senate. It is organized into 17 different Colleges and the Graduate School, and each of these 17 Colleges is further divided into various academic departments. One such department is the Department of Aviation, a department within Ohio State's College of Engineering.

Ohio State does operate an airport, called The Ohio State University Airport. The Airport is operated by the Department of Aviation. Indeed, the Chairman of the Department of Aviation is also the Manager of the University Airport. It is important to note that the

Department operates the Airport as a teaching laboratory for its academic programs. As stated by Judge Bryan: "Indeed, Ohio State has further indicated that the airport is operated by the university primarily as a teaching facility." (A-14). In this way, the missions of the University — teaching, research and public service — are fulfilled through the operation of this facility.

The University Airport has been characterized as a teaching laboratory analogous to the University Hospital operated by the University's College of Medicine and used to provide teaching and training facilities for its medical students. This analogy was recognized by both courts below when Judge Bryan noted at footnote 9: "It is helpful to consider analogously the University teaching hospital." (A-14).

Ohio State operates the Airport primarily to serve as a center for University flight training and academic research being conducted by the Department of Aeronautical and Astronautical Engineering within the College of Engineering. While the University Airport does not provide regular commercial service, some aviation services such as hangaring, tie down and maintenance are provided to the state and private aircraft based there. The University views the providing of such services as an enhancement to its ability to train its aviation students in a real world laboratory setting — much in the same manner as The Ohio State University Hospital is beneficial to its medical students.

The University owns approximately 23 aircraft which are used for student flight instruction. Although an additional 230 to 240 planes are based at the Airport, over 100 of those aircraft are owned by the State of Ohio through its Air National Guard, the State Highway

Patrol, the Governor's Office and the State of Ohio Department of Transportation. During each quarter at Ohio State, approximately 150 students are enrolled in courses for credit in the Department of Aviation, and approximately 50 to 70 persons are enrolled in flight training.

Ohio State charges and receives fees from flight instruction, charter service, sponsored research grants and other services provided by the Department of Aviation. The fees obtained from the operation of the Airport by the Department of Aviation, like the fees and charges of the University Hospital and College of Medicine, are unrestricted State funds. In fact, all funds received by Ohio State, be they restricted or unrestricted, are state funds and are subject to the expenditure policies and regulations of the State of Ohio and its Auditor.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

The Decision of the Court of Appeals Affirming the Opinion of the District Court that the Eleventh Amendment Immunity is not Waived by a State's Involvement in an Activity which is Federally Regulated is not a Question Justifying this Court's Review.

This case involves no novel issue of federal law justifying review by this Court. The case is merely a common law tort claim for damages brought in federal court against an instrumentality of the State of Ohio. Petitioner concedes that The Ohio State University is the "alter ego" of the State of Ohio and that this action is a suit against the State of Ohio. Thus, the applicability of the Eleventh Amendment to the Constitution of the United States to bar suits brought against Ohio State in federal court is not an issue.

The only issue Petitioner seeks to have this Court review is whether Ohio State's Eleventh Amendment immunity has been waived by the State of Ohio. This issue has been fully settled by decisions of this Court and those decisions have been uniformly followed by the courts which have considered this case and and by all the Courts of Appeals that have addressed these issues.

The United States District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit both concluded that there had been no waiver. In seeking a review of these holdings, Petitioner asserts that a waiver should have been found to exist because the State of Ohio entered into a sphere of activity which is federally regulated. However, this Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), clearly and explicitly laid to rest Petitioner's contention. In that case, this Court concluded that a state's involvement in activities which are subject to pervasive congressional regulation is not sufficient to constitute a waiver of the constitutional protection afforded by the Eleventh Amendment:

> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts. 415 U.S. at 673.

This holding by the *Edelman* Court was recognized by Judge Bryan below and it has been consistently applied by the lower courts. *Lumbermens Mutual Casualty Co.* v. *Fugate*, 569 F.2d 213 (4th Cir. 1978) (acceptance and disbursement by a state of federal funds pursuant to Federal-Aid Highway Act does not waive immunity);

Dawkins v. *Craig*, 483 F.2d 1191 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974) (participation in federal AFDC program does not waive immunity); *Williamson Towing Co., Inc.* v. *State of Illinois*, 396 F. Supp. 431 (E.D. Ill. 1975), *aff'd*, 534 F.2d 758 (7th Cir. 1976) (maintenance by a State Department of Transportation of bridge involved in interstate commerce does not waive immunity); *MacKethan* v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E.D. Va. 1974), *aff'd*, 508 F.2d 838 (4th Cir. 1974) (state involvement in securities regulation insufficient to waive immunity).

In light of *Edelman*, Petitioner's request for review is ironic. The question of whether entry into a federally regulated sphere of activity constitutes an implied waiver of Eleventh Amendment immunity is no longer unsettled. As stated by this Court: "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Edelman*, 415 U.S. at 673.

Petitioner attempts to avoid *Edelman's* clear declaration that more than mere entry into a federally regulated activity is necessary before a waiver of Eleventh Amendment immunity can be found by relying upon this Court's prior holding in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964). Petitioner's reliance upon *Parden*, however, is misplaced. There is no inconsistency between the decision in *Parden* and *Edelman*.

In *Parden* this Court addressed for the first time a state's claim of Eleventh Amendment immunity in an action brought against the state pursuant to an Act of Congress authorizing such a private right of action — The Federal Employers' Liability Act. *See Parden*, 377

U.S. at 187. Significantly, in that case, the express statutory right of action created by Congress included relief against a class of defendants that "literally included States or state instrumentalities." *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974). Under those circumstances, this Court recognized a waiver of Eleventh Amendment immunity.

In *Edelman*, however, this Court subsequently made clear that absent an *expressly created* cause of action, such as existed in *Parden*, an implied waiver of Eleventh Amendment immunity is not proper:

> Both *Parden* and *Employees* [411 U.S. 279 (1973)] involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, [359 U.S. 275 (1959)] involved a congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity. 415 U.S. at 672.

Moreover, this Court delineated in *Edelman* that where no congressional cause of action exists, as in this case, *Parden* is inapplicable:

> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus

> respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well. 415 U.S. at 672.

In the instant case *no congressional authorization* to sue a class of defendants literally including the State of Ohio exists; hence, Petitioner, like the Respondent in *Edelman*, is precluded from relying upon the holding in *Parden*. As stated by Judge Bryan:

> Here the State of Ohio through its airport participates in activities involving interstate commerce — certainly an area subject to pervasive federal regulation. Yet under *Edelman* such participation is insufficient alone to constitute the necessary express or overwhelming implied statement of waiver. (A-13).

This action clearly falls within the principles set forth in *Edelman*.

Petitioner further seeks to avoid *Edelman's* holding by intimating that this matter may be covered by the Federal Aviation Act. Again, this Court has made clear that despite agreements to participate in and administer federal programs in compliance with federal laws, a waiver of Eleventh Amendment immunity will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " 415 U.S. at 673.

Certainly, the Federal Aviation Act, contrary to Petitioner's suggestion, is not a statute which either by "express language" or "overwhelming implications" establishes consent on the part of the state to be sued in federal court. The Act does not authorize a private right of action against any defendants, let alone a *state* defendant. Again, as the District Court correctly stated,

Petitioner's attempts to cure this "defect" in the Federal Aviation Act, by reference to an implied right of action, is unequivocally precluded by *Edelman:*

> While whether the Federal Aviation Act confers a private right of action is debatable, such a right of action, implied as it must be, is insufficient to constitute an intent of Congress "to abrogate the immunity in question." As the Court explained in *Edelman:*
>
> > [W]hile the Court has, in cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant. 415 U.S. at 673-674.
>
> (A-13).

More importantly, whether or not an implied right of action could or should be implied under the Federal Aviation Act is simply irrelevant to this case. As Judge Bryan correctly observed, Petitioner has not alleged any violation of a federal regulation; he has not even attempted to allege an implied right of action under the Federal Aviation Act. Petitioner has asserted nothing more than a common law aviation tort against the State of Ohio in federal court. It was precisely this situation that the Eleventh Amendment was designed to prevent. *See Hans* v. *Louisiana*, 134 U.S. 1 (1890).

In short, then, it is clear that under this Court's holdings in *Parden* and *Edelman*, waiver of a state's constitutional immunity cannot be premised merely upon entry into a sphere of federally regulated activity. More importantly, in a case such as the instant one,

where no specific, congressionally authorized cause of action is present, waiver will not be implied. The language of *Edelman* is clear — waiver of Eleventh Amendment immunity can only arise by virtue of "express language" or "overwhelming implications." These factors are simply not present here. The United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit correctly applied the Eleventh Amendment immunity waiver doctrines as enunciated by this Court. No conflict exists between their decisions and the holdings of this Court or those of other circuits. Petitioner's own dissatisfaction with the principles enunciated by this Court is simply not grounds for granting certiorari.

II.

The Decision of the Court of Appeals Affirming the Determination of the District Court that the Eleventh Amendment Immunity is not Waived by a State's Procurement of Insurance is not a Question Justifying Review by this Court.

Petitioner also urges review of the well-reasoned decisions below because of his allegation that in the instant case there will be no impact on the treasury of the State of Ohio. As noted above, Petitioner concedes that The Ohio State University is the alter ego of the State of Ohio. Thus, once again there can be no question of the applicability of the Eleventh Amendment. For it not to apply, the procurement of a liability insurance policy must constitute a waiver of the constitutional protection. But once again, Petitioner's attempt to imply waiver from the existence of an insurance policy runs afoul of the express waiver doctrine of *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

In cases decided both before and after *Edelman*, lower courts have uniformly held that the procurement of insurance does not constitute a waiver of a state's

constitutional immunity. As the Court correctly reasoned in *Huckins* v. *Bd. of Regents of the Univ. of Michigan*, 263 F. Supp. 622, 624 (E.D. Mich. 1967):

> Even if the existence of liability insurance had amounted to a waiver of immunity from suit, the State of Michigan did not consent to such suit in the federal court.

See also Korgich v. *Regents of the New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978) (no waiver of Eleventh Amendment immunity from existence of an insurance policy).

The refusal of lower courts to find waiver premised upon the existence of an insurance policy is based upon sound reasoning. A state may, after all, waive its *sovereign* immunity without waiving its Eleventh Amendment immunity. *See Edelman* v. *Jordan*, 415 U.S. 651, 677, n.19 (1974). The State of Ohio has, for example, qualifiedly waived its sovereign immunity to the extent that it has consented to be sued in a forum expressly created to hear suits brought against the state or its instrumentalities. Ohio Rev. Code §2743.02.[2] In this regard, a federal court in Ohio has specifically held that the Court of Claims Act, qualifiedly waiving Ohio's sovereign immunity with respect to those claims submitted to that Court, does not constitute a waiver with respect to actions pending in federal or other state courts. *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

---

[2] That statute provides in pertinent part:

> (A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter.

Because of this waiver of sovereign immunity, states such as Ohio have deemed it advisable to procure insurance in certain circumstances. But, a state cannot and should not be deemed to have waived its *constitutional* immunity because it chooses to protect itself from the financial consequences inherent in the abrogation of *sovereign* immunity. Such a result would constitute an interference with the state's internal operations and sovereign decision-making in direct contravention of the concept of federalism embodied in the Eleventh Amendment. Such a result would also be contrary to the decisions reached by all courts which have held that a state can waive sovereign immunity and subject itself to liability in its own courts without relinquishing its Eleventh Amendment immunity from suits in federal courts. *Brennan* v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971); *Hamilton Mfg. Co.* v. *Trustees of State Colleges in Colorado*, 356 F.2d 599 (10th Cir. 1966); *Medicenters of America, Inc.* v. *Commonwealth of Virginia*, 373 F. Supp. 305 (E.D. Va. 1974).

Under the clear dictates of *Edelman*, there has been no conflict among the lower courts that have addressed this issue. Moreover, under the circumstances of the instant case, such an issue hardly rises to the status of an important question of law which warrants review by this Court.

CONCLUSION

For the reasons set forth, there are no grounds for granting a writ of certiorari and reviewing the opinion and judgment of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the Eastern District of Virginia. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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